Pelangi Enterprises Sdn Bhd v Oh Swee Choo & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–33 OF 2001
RAUS J
15 JANUARY 2004

Administrative Law — Remedies — Certiorari — Award of Industrial Court — Finding of fact that employee constructively dismissed — Whether finding based on totality of evidence adduced — Whether Industrial Court took irrelevant matters into consideration

Evidence — Hearsay — Statement made by person not called — Whether object of evidence to establish truth of statement or fact that it was made

Labour Law — Industrial Court — Award — Application to quash — Constructive dismissal — Whether finding based on totality of evidence adduced — Whether Industrial Court took irrelevant matters into consideration

Labour Law — Industrial Court — Claim for back wages — Industrial Court awarded back wages for duration of 44 months Considerable delay in concluding case before Industrial Court — Delay not caused by parties — Whether delay constitute reason to reduce amount of back wages payable

The first respondent joined the services of Taman Desa Medical Centre ('TDMC') in the capacity of General Manager in February 1995. At that time, the first respondent was 53 years of age. By letter dated 13 July 1995, TDMC offered to sponsor the first respondent to a part-time two-year course leading to the Master of Science in Healthcare Management. Under the terms of the sponsorship, the first respondent was to continue working full time for TDMC as the classes were conducted in the evenings. The first respondent was also obliged to serve TDMC for a period of three years on completion of her course, by which time the first respondent would be 56 years old. Subsequently, the first respondent received a letter dated 7 October 1996 from the applicant informing her that she had to retire upon reaching her 55th birthday in accordance with the 'service regulations for confirmed employees' and freeing her of any obligation to serve in TDMC on the completion of her course ('the retirement letter'). On 31 October 1995, which was the first respondent's 55th birthday, the applicant issued a letter titled 're-employment' to the first respondent offering her employment on a contractual basis as 'General Manager (Marketing and Special Projects)' on a month-to-month basis for a maximum of 12 months ('the re-employment letter'). The first respondent sent a letter to the applicant in which she stated that she was unable to sign and accept the terms as contained in the re-employment letter and requested that the retirement letter and the re-employment letter be withdrawn failing which she would consider herself dismissed by the applicant. The applicant did not reply but instead sent another letter of re-employment to the first respondent. The first respondent, in a letter dated 8 November 1996 to the

applicant, treated herself as having been constructively dismissed and filed a complaint before the Industrial Relations Department pursuant to s 20 of the Industrial Relations Act 1967. The Minister of Human Resources referred the complaint to the Industrial Court. The Industrial Court handed down an award in favour of the first respondent and held that the first respondent was entitled to treat herself as being constructively dismissed and ordered the applicant to pay the first respondent back wages and compensation in lieu of reinstatement. This was the applicant's application for an order for certiorari to quash the decision of the Industrial Court.

Held, dismissing the application:

(1) There were two burdens of proof involved in this case. The first burden of proof was the onus of proving that the first respondent was constructively dismissed by the applicant. In this regard, the first respondent had to prove two elements, namely, that the applicant's conduct was guilty of a breach which went to the root of the contract or evinced an intention no longer to be bound by it and that the first respondent had made up his mind and had acted at the appropriate time soon after the conduct of which the complaint had taken place. In the instant case, the Industrial Court was satisfied that, in the absence of any retirement age of 55 years in the second respondent's contract of employment, the applicant's conduct in purporting to retire the first respondent upon her reaching 55 years old was a serious breach of her contract of employment. The Industrial Court was also satisfied that the first respondent had left the applicant's services in response to the aforesaid breach by the applicant and had acted at the appropriate time. Accordingly, the Industrial Court ruled that the first respondent had succeeded in proving the above two elements. Therefore, the Industrial Court did not commit any error to justify intervention of this court (see paras 15–20).

(2) The second burden of proof was the burden of proving that the first respondent was bound by a compulsory retirement age of 55 years under the terms of her contract of employment. This burden or onus of proof rested on the applicant because it was the applicant who sought to rely on the existence of such contractual terms in its case before the Industrial Court. The applicant had failed to do so (see paras 21–22); *HSS Integrated Sdn Bhd v Lew Yew Onn* [2000] 3 ILR 31 followed.

(3) Evidence of a statement made to a witness by a person who was not himself called as a witness would be hearsay and inadmissible when the object of the evidence was to establish the truth of what was contained in the statement. On the other hand, it would not be hearsay and was admissible when it was proposed to establish by evidence, not the truth of the statement, but the fact that it was made. Hence, the first respondent's evidence that she had been assured by TDMC's then managing director ('Dr Wong') that there was no retirement age was not hearsay evidence, although Dr Wong did not testify (see para 23).

(4) The Industrial Court made a finding of fact that Dr Wong had given the second respondent the assurance that there was no retirement age and there was no reason to disturb such finding. Although the first respondent had attempted to subpoena Dr Wong to support her testimony, this did not in any way absolve the applicant from discharging its burden of proof on the retirement age as a term of contract, which it had evidently failed to do (see para 25).

(5) The Industrial Court found that the issue of retirement age had been pleaded by the first respondent and there was no reason to disagree with that finding. The applicant cannot claim that it was taken by surprise by the first respondent's contention that there was no retirement age of 55 years in her contract (see paras 26–27).

(6) The Industrial Court made a finding of fact that at the time the first respondent left the applicant's services, the 'Employees' Handbook' and the 'Confirmed Employees Service Regulation Handbook' ('the handbooks'), which stipulated the retirement age of the employees, had not been issued. The Industrial Court also found that the first respondent cannot be deemed to be bound by the provisions in the handbooks. There was no reason to disagree with the Industrial Court's findings (see paras 32–33).

(7) There was no basis to the applicant's submission that it was only giving effect to the letter of 13 July 1995 by retiring the second respondent and thereafter offering her continued employment on a contractual basis. The applicant's letter of 13 July 1995 clearly stated that on completion of the course, the second respondent would be obliged to serve the applicant for a period of three years in an appointment to be determined by TDMC. It was not disputed that when the applicant had attempted to forcibly 'retire' the second respondent, she had still not completed her course. Furthermore, evidence was led by the first respondent to show that the two letters of re-employment offered to the first respondent by the applicant contained less favourable terms and conditions of employment and were therefore, rejected by the first respondent. The Industrial Court consequently made a finding of fact that the two letters of re-employment offered were in fact on less favourable term. There was no error of law justifying any intervention by way of judicial review (see paras 36–38).

(8) The Industrial Court had awarded back wages for a total duration of 44 months. The applicant's contention was that the Industrial Court in awarding the maximum quantum of back wages, had failed to appreciate that the delay in this matter had nothing to do with the applicant. There was no doubt that there was a considerable delay in concluding this case before the Industrial Court. However, this cannot be a reason to reduce amount of back wages payable to the first respondent. This was because none of the causes of the delay were caused by the first respondent. In any event, the Industrial Court had already reduced

the back wages due to first respondent by 30% on account of her post-dismissal employment (see paras 39–42).

(9) The Industrial Court's finding that the second respondent had been constructively dismissed was a finding of fact. The finding was based on the totality of evidence adduced before it. The Industrial Court had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It was not the task of this court to scrutinize every piece of evidence adduced before the Industrial Court and make another finding of fact. What was important to consider was whether the findings of the Industrial Court were well supported by evidence adduced in the course of trial and whether it had taken irrelevant matters into consideration in making the award. In the instant case, the Industrial Court findings were well supported by evidence and it did not take irrelevant matters into consideration. The award was neither perverse nor unreasonable and the grounds of challenge raised by the applicant did not disclose any error of law warranting intervention by this court by way of judicial review (see paras 43–44).

[**Bahasa Malaysia summary**

Responden pertama telah mula berkhidmat dengan Pusat Perubatan Taman Desa ('PPTD') dalam kapasiti seorang Ketua Pengarah dalam bulan Februari 1995. Pada masa itu, responden pertama berumur 53 tahun. Melalui sepucuk surat bertarikh 13 Julai 1995, PPTD telah menawar untuk menaja responden pertama mengambil kursus secara sambilan selama dua tahun untuk memperoleh Ijazah Sarjana Muda dalam Pengurusan Kesihatan. Di bawah terma tajaan tersebut, responden pertama harus terus bekerja sepenuh masa untuk PPTD kerana kelas hanya dikendalikan di sebelah petang. Responden pertama juga diwajibkan berkhidmat dengan PPTD untuk tempoh tiga tahun selepas tamat kursusnya, yang man responden pertama akan berumur 56 tahun. Berikutan itu, responden pertama telah menerima sepucuk surat bertarikh 7 Oktober 1996 daripada pemohon memaklumkan beliau bahawa beliau perlu bersara apabila mencapai umur 55 tahun menurut 'service regulations for confirmed employees' dan melepaskan beliau daripada apa-apa kewajipan untuk berkhidmat dalam PPTD selepas tamat kursusunya ('surat persaraan tersebut'). Pada 31 Oktober 1995, yang merupakan hari jadi ke-55 responden pertama, pemohon telah mengeluarkan sepucuk surat bertajuk 're-employment' kepada responden pertama menawarkan pekerjaan secara kontrak kepada beliau sebagai 'General Manager (Marketing and Special Projects)' secara bulanan selama 12 bulan maksimum ('surat pengambilan bekerja semula'). Responden pertama telah menghantar sepucuk surat kepada pemohon menyatakan beliau tidak dapat menandatangani dan menerima terma-terma yang terkandung dalam surat pengambilan bekerja semula dan memohon agar surat persaraan dan surat pengambilan bekerja semula tersebut ditarik balik dan jika gagal berbuat demikian beliau akan menganggap dirinya dipecat oleh pemohon. Pemohon tidak menjawab tetapi sebaliknya menghantar sepucuk surat pengambilan

bekerja semula yang lain kepada responden pertama. Responden pertama, dalam sepucuk surat bertarikh 8 November 1996 kepada pemohon, menganggap beliau dipecat secara konstruktif dan memfailkan satu aduan di hadapan Jabatan Perhubungan Perusahaan menurut s 20 Akta Perhubungan Perusahaan 1967. Menteri Sumber Manusia telah merujuk aduan tersebut ke Mahkamah Perusahaan. Mahkamah Perusahaan telah memberi award bagi pihak responden pertama dan memutuskan responden pertama berhak menganggap dirinya telah dipecat secara konstruktif dan memerintahkan pemohon membayar responden pertama gaji tunggakan dan pampasan menggantikan pengembalian semula jawatan. Ini adalah permohonan pemohon untuk satu perintah certiorari untuk membatalkan keputusan Mahkamah Perusahaan.

Diputuskan, menolak permohonan tersebut:

(1) Terdapat dua beban bukti yang terlibat dalam kes ini. Beban bukti pertama adalah beban membuktikan responden pertama telah dipecat secara konstruktif oleh pemohon. Sehubungan itu, responden pertama perlu membuktikan dua elemen, iaitu, bahawa perlakuan pemohon adalah salah kerana melakukan satu perlanggaran kontrak atau memperlihatkan niat bahawa ia tidak terikat dengannya dan bahawa responden pertama telah membuat keputusan dan telah bertindak pada masa yang sesuai sejurus selepas perlakuan yang mana aduan dibuat. Dalam kes semasa, Mahkamah Perusahaan telah berpuas hati bahawa, ketiadaan umur persaraan pada 55 tahun dalam kontrak pekerjaan responden kedua, perlakuan pemohon yang bermaksud agar responden pertama bersara apabila beumur 55 tahun merupakan satu perlanggaran kontrak pekerjaan yang serius. Mahkamah Perusahaan juga berpuas hati bahawa responden pertama telah meninggalkan perkhidmatan pemohon akibat daripada perlanggaran tersebut oleh pemohon dan telah bertindak pada masa yang tepat. Sewajarnya, Mahkamah Perusahaan memutuskan bahawa responden pertama telah berjaya membuktikan dua elemen di atas. Oleh itu, Mahkamah Perusahaan tidak melakukan apa-apa kesilapan untuk menjustifikasikan apa-apa campur tangan mahkamah ini (lihat perenggan 15–20).

(2) Beban bukti kedua adalah beban untuk membuktikan bahawa responden pertama terikat dengan umur persaraan wajib pada 55 tahun di bawah terma kontrak pekerjaan. Beban bukti terletak atas pemohon kerana pemohonlah yang meminta untuk bergantung kepada kewujudan terma kontraktual dalam kesnya di hadapan Mahkamah Perusahaan. Pemohon telah gagal berbuat demikian (lihat perenggan 21–22); *HSS Integrated Sdn Bhd v Lew Yew Onn* [2000] 3 ILR 31 diikut.

(3) Keterangan kenyataan yang dibuat kepada saksi oleh seorang yang bukan sendirinya seorang saksi adalah dengar cakap dan tidak boleh diterima jika tujuan keterangan adalah untuk membuktikan kebenaran tentang apa yang terkandung dalam kenyataan tersebut. Sebaliknya, ia bukan dengar cakap dan boleh diterima jika ia bercadang untuk

membuktikan melalui keterangan, bukan kebenaran kenyataan, tetapi hakikat bahawa ia telah dibuat. Oleh itu, keterangan responden pertama bahawa beliau telah diberi jaminan oleh pengarah urusan PPTD masa itu ('Dr Wong') bahawa tiada umur persaraan yang buken keterangan dengar cakap, meskipun Dr Wong tidak memberi testimoni (lihat perenggan 23).

(4) Mahkamah Perusahaan telah membuat penemuan fakta bahawa Dr Wong telah memberi jaminan kepada responden kedua bahawa tidak terdapat umur persaraan dan tiada sebab untuk mengganggu penemuan sedemikian. Walaupun responden pertama telah cuba untuk menyampaikan sepina kepada Dr Wong untuk menyokong testimoni beliau, ini tidak langsung membebaskan pemohon daripada terlepas daripada beban bukti berkaitan umur persaraan sebagai satu terma kontrak, yang mana ia dengan jelas ia telah gagal untuk berbuat demikian (lihat perenggan 25).

(5) Mahkamah Perusahaan mendapati bahawa persoalan tentang umur persaraan telahpun diplidkan oleh responden pertama dan tiada sebab untuk tidak bersetuju dengan penemuan tersebut. Pemohon tidak boleh mendakwa bahawa beliau terkejut dengan hujah responden pertama bahawa tidak terdapat umur persaraan pada 55 tahun dalam kontrak beliau (lihat perenggan 26–27).

(6) Mahkamah Perusahaan telah membuat satu penemuan fakta bahawa pada masa itu responden pertama meninggalkan perkhidmatan pemohon, 'Employees' Handbook' dan 'Confirmed Employees Service Regulation Handbook' ('buku-buku panduan tersebut'), yang menetapkan umur persaraaan pekerja-pekerja, tidak dikeluarkan. Mahkamah Perusahaan juga mendapati bahawa responden pertama tidak boleh dianggap terikat dengan peruntukan-peruntukan dalam buku-buku panduan tersebut. Tiada sebab untuk tidak bersetuju dengan penemuan-penemuan Mahkamah Perusahaan (lihat perenggan 32–33).

(7) Tiada asas terhadap hujah pemohon bahawa ia hanya memberi efek terhadap surat 13 Julai 1995 dengan memecat responden kedua dan selepas itu menawarkannya untuk bekerja terus secara kontraktual. Surat pemohon bertarikh 13 Julai 1995 dengan jelas menyatakan bahawa selepas selesai kursus tersebut, responden kedua diwajibkan berkhidmat dengan pemohon untuk satu tempoh tiga tahun dalam jawtan perlantikan yang akan ditentukan oleh PPTD. Ia tidak dipertikaikan bahawa apabila pemohon cuba untuk memaksa responden kedua 'bersara', beliau masih belum selesai kursusnya. Tambahan pula, keterangan yang dikemukakan oleh responden pertama menunjukkan bahawa dua pucuk surat pengambilan bekerja semula ditawarkan kepada responden pertama oleh pemohon mengandungi terma-terma dan syarat-syarat pekerjaan yang kurang memuaskan dan oleh itu, ditolak oleh responden pertama. Mahkamah Perusahaan berikutan itu membuat satu penemuan fakta bahawa dua pucuk surat pengambilan semula bekerja sebenarnya

tidak menguntungkan. Tiada kesilapan di sisi undang-undang yang menjustifikasikan apa-apa campur tangan melalui kajian semual kehakiman (lihat perenggan 36–38).

(8) Mahkamah Perusahaan telah mengawardkan gaji tunggakan bagi tempoh sejumlah 44 bulan. Hujah pemohon adalah bahawa Mahkamah Perusahaan dalam mengawardkan kuantum gaji tunggakan yang maksimum, telah gagal untuk menyedari bahawa kelewatan dalam perkara ini tiada kaitan dengan pemohon. Tiada keraguan bahawa terdapat kelewatan yang melampau dalam memutuskan kes ini dihadapan Mahkamah Perusahaan. Namun begitu, ini tidak boleh dijadikan alasan untuk mengurangkan jumlah gaji tunggakan responden pertama. Ini adalah kerana tiada antara sebab-sebab kelewatan tersebut diakibatkan oleh responden pertama. Dalam apa keadaan, Mahkamah Perusahaan telahpun mengurangkan gaji tunggakan yang perlu dibayar kepada repsonden pertama sebanyak 30% berdasarkan pra pemecatan pekerjaaan beliau (lihat perenggan 39–42).

(9) Penemuan Mahkamah Perusahaan bahawa responden kedua telah dipecat secara konstruktif adalah satu penemuan fakta. Penemuan tersebut adalah berdasarkan keseluruhan keterangan yang dikemukakan. Mahkamah Perusahaan telah meneliti keterangan kedua belah pihak dan menggunapakai undang-undang kepada fakta tersebut dan membuat kuputusan yang munasabah. Ia bukan tugas mahkamah ini untuk meneliti setiap keterangan yang dikemukakan di hadapan Mahkamah Perusahaan dan membuat penemuan fakta lain. Apa yang penting untuk dipertimbangkan adalah sama ada penemuan Mahkamah Perusahaan disokong oleh keterangan yang dikemukakan semasa perbicaraan dan sama ada ia telah menimbangkan perkara-perkara yang tidak relevan in making the award. Dalam kes semasa, penemuan-penemuan Mahkamah Perusahaan disokong oleh keterangan dan ia tidak mengambil perkara-perkara yang tidak relevan untuk dipertimbangkan. Award tersebut adalah sama sekali tidak berlawanan atau tidak munasabah dan alasan-alasan untuk mencabar ditimbulkan oleh pemohon tidak mendedahkan apa-apa kesilapan undang-undang yang mewarankan campur tangan mahkamah ini dengan cara kajian semula kehakiman (lihat perenggan 43–44).]

Notes

For cases on awards of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 185–393.

For cases on claim for back wages, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1289.

For cases on statement made by persons not called, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1599–1600.

Cases referred to

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515 (refd)
Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)
HSS Integrated Sdn Bhd v Lew Yew Onn [2000] 3 ILR 31 (folld)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305 (refd)
Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Evidence Act 1950 s 101
Industrial Relation Act 1967 s 20

T Thavalingan (Zaid Ibrahim & Co) for the applicant.
LG Seah (Lobo & Associates) for the first respondent.

Raus J:

[1] This is an application by the applicant for an order for certiorari to quash the decision of the Industrial Court in Award No 115 of 2001 dated 23 February 2001. The Industrial Court held that Oh Swee Choo ('the first respondent') was entitled to treat herself as being constructively dismissed and ordered that the applicant to pay the first respondent back wages of 44 months from 9 November, 1996 to 2 July 2000 totaling RM191,730. The Industrial Court also ordered the applicant to compensate the first respondent in lieu of reinstatement a one month's salary for every year of service from 1 February 1995 to 2 July 2000 totaling RM31,125. Thus, the total sum ordered by the Industrial Court due and payable to the first respondent was RM222,855.

[2] The factual background giving rise to this application are as follows.

[3] The applicant, Pelangi Enterprises Sdn Bhd was the operator of Taman Desa Medical Centre ('TDMC') located at Jalan Kelang Lama, Kuala Lumpur. The idea of setting up the TDMC was conceived by Dr Ismail Abdul Rashid sometime in early 1993. Dr Ismail had requested a friend by the name of Dr Wong Wai Peng ('Dr Wong') to help him and established the TDMC. The first respondent, joined the services of TDMC in 1995 in the capacity of General Manager. At that material time, she was 53 years of age and was a state registered nurse by profession. She had served the government from 1961 to 1991 and optionally retired at the age of 50. After retirement, she was

employed by Pantai Medical Centre from 1 November 1991 up until January 1995, thereafter commenced employment with the applicant's company effective 1 February 1995.

[4] The first respondent's offer of employment dated 1 February 1995 was signed by one Dr Wong in his capacity as Managing Director of TDMC. It was a two page document outlining the first respondent's terms and conditions of employment. Clause 9 (Rules & Regulations) of the offer letter expressly provides as follows:

> Your appointment shall be governed by the Service Regulations for Confirmed Employees of this Medical Centre.

[5] The first respondent was confirmed in her appointment with effect from 1 May 1995. Subsequently, by letter dated 13 July 1995, TDMC offered to sponsor the first respondent a part-time two year course leading to the Master of Science in Healthcare Management awarded by the University of Wales, Swansea. Under the terms of the sponsorship, TDMC would pay for the course fees including the examination fees. In addition to this, the first respondent was to continue working full time for TDMC and to be paid her monthly salary and allowances as usual (the course was conducted locally and classes were held in the evenings). It was also an express term of the sponsorship letter that the first respondent will be obliged to serve TDMC for three years on completion of her course (which was due to be completed in April 1997), by which the first respondent would be 56 years old.

[6] About 10 months after the first respondent and TDMC entered into sponsorship, TDMC underwent changes in the management through a notice issued by Dr Ismail Rashid dated 21 May 1996. Due to the changes, the first respondent has to resign from TDMC effective 1 June 1996 and accepted re-employment with the applicant, now called Pelangi Enterprises Sdn Bhd with immediate effect and without any loss of benefit under her earlier terms of employment. However, on 11 October 1996, the first respondent received a letter dated 7 October 1996 informing her that she has to retire on reaching her 55th birthday in accordance with the 'service regulations for confirmed employees' and freeing her of any obligation to serve the company on the completion of her Master of Science course and treated its letter of 13 July 1995 (the sponsorship agreement) as cancelled. On 31 October 1996 (which was on the first respondent's birthday), the applicant issued a letter titled 're-employment' offering the first respondent employment on a contractual basis as 'General Manager (Marketing and Special Projects)' on a month to month basis for a maximum of 12 months. In reply, the first respondent in a letter dated 16 October 1966 requested the applicant to revoke its letter dated 7 October 1996. Subsequently, on 5 November 1996 she sent another letter in which she stated that she was unable to sign and accept the terms as contained in the applicant's letter dated 31 October 1996 and requested that the letter dated 7 October 1996 and 31 October, 1996 be withdrawn by 8 November 1996 failing which she would consider herself dismissed by

the applicant as at 9 November 1996. The applicant did not reply to her letter but instead sent her another letter of re-employment dated 7 November 1996. The first respondent then, in a letter dated 8 November 1996, treated herself having been constructively dismissed from the applicant effective from 9 November 1996. The said letter states as follows:

> Oh Swee Choo
> c/o Taman Desa Medical Centre
> Jalan Desa, Taman Desa.
>
> 8 November 1996
>
> The Executive Chairman
> Taman Desa Medical Centre
> Jalan Desa, Taman Desa
> Off Jalan Kelang Lama
> 58100 Kuala Lumpur.
>
> Dear sirs,
>
> I refer to my letter dated 5 November 1996 and your letter dated 7 November 1996 on my employment with the Company.
>
> Since you have not complied with my request in my letter of 5 November 1996 but *instead gave me a slightly different letter of re-employment*, I have no alternative but to consider myself dismissed by the Company with effect from 9 November 1996.
>
> Yours sincerely,
>
> Oh Swee Choo
>
> .....
>
> cc
>
> Dr Wong Wai Peng

[7] The first respondent thereafter, filed a complaint before the Industrial Relations Department pursuant to s 20 of the Industrial Relation Act 1967 ('the Act'). Subsequently, the Honourable Minister of Human Resource referred the complaint to the Industrial Court. The complaint was registered as Case No 2/4-419/97. On 23 February 2001 the Industrial Court handed down an award in favour of the first respondent as stated earlier. The applicant is now seeking to quash the whole award for errors of law.

[8] The principles on judicial review is well settled. The Supreme Court in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 held that:

> Judicial Review is not an appeal from a decision but a review on the manner in which the decision was made and the High court is not entitled on an application for judicial review to consider the decision itself, on the merit of the facts, was fair and reasonable.

[9] In *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, Shaik Daud JCA, said at p 309:

> First and foremost, it must be emphasized that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction.
>
> The court is more concerned with the decision making process and not the decision itself.

[10] In *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, KC Vohrah J adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are 'illegality', 'irrationality' and 'procedural impropriety'.

[11] With the above principles in mind, I shall now consider the grounds mounted by the applicant.

FIRST GROUND OF CHALLENGE

[12] The applicant's first ground of challenge revolves around the purported oral assurances made by Dr Wong to the first respondent prior to her commencing employment with the applicant. In the course of its award, the Industrial Court held as follows:

> A perusal of the claimant's letter of offer of employment 'CLE1' disclosed that there is no specific provision nor express clause regulating the age of retirement therein. However, her age of birth is clearly stated on the top left hand of CLE1. CLE 1 is signed by Dr Wong Wai Peng as Managing Director, Taman Desa Medical Centre, the very same person who had interviewed the claimant for the job. *This court accepts the claimant's evidence that she was told by Dr Wong Wai Peng during the interview that there would not be any retirement age.* (Emphasis added.)

[13] The Industrial Court further held as follows:

> *This Court is satisfied from the evidence that the general age of retirement in the Company is 55 years but that Dr Wong did, in fact, give claimant such an assurance and that he was action for and on behalf of the Company and he had authority to do so. This Court finds that the assurance given by Dr Wong was instrumented to the claimant accepting the offer of employment CLE 1*. It was a clarification given by Dr Wong since CLE 1 did not contain any provision pertaining to retirement. This reinforces the contention that the claimant was not to retire at the age of 55 years. *This Court is further satisfied that the issue of retirement was pleaded by the claimant in para 3.2 of her statement of case and accepts that evidence in regard to thereof be tendered in Court.* (Emphasis added.)

[14] It is the submission of the applicant that the first respondent had failed to substantiate her claim that Dr Wong had informed her during the course of her interview prior to her commencing employment that she did not have a retirement age. This is because according to the applicant, the first respondent failed to produce Dr Wong as her witness before the Industrial Court to substantiate the same. Thus, according to the applicant her testimony

was essentially based on hearsay evidence and as such there was no evidence on this issue to justify the Industrial Court in coming to the finding that 'Dr Wong did in fact, give the claimant an assurance as such'. This in itself, as submitted by the applicant, is an error justifying intervention by this court.

[15] The applicant further submitted that Dr Wong's purported statement at the interview in January 1995 and that the first respondent had no retirement age was not pleaded in the first respondent's statement of case. Thus, the applicant contended that in reaching a decision in accepting the first respondent's hearsay evidence on Dr Wong's purported assurance and holding that the issue of retirement was pleaded in para 3.2 of the statement of case, the Industrial Court committed errors of law and exceeding its jurisdiction for the following reasons:

(a) it failed to appreciate that the burden of proof in claims for constructive dismissal lies on the aggrieved worker, that is, the first respondent in the instant case and the first respondent had failed to discharge such a burden;

(b) it came to its decision based on hearsay evidence which was not supported by any proof;

(c) it took into account irrelevant considerations particularly the unsupported oral averments of the first respondent that Dr. Wong had informed her during her interview that there was no retirement age for her; and

(d) it erred in law when it took into account unpleaded matters/facts particularly the bare and unsubstantiated averment of the first respondent that Dr Wong had informed her that she had no retirement age.

[16] With due respect, I am unable to agree. I am of the view that the Industrial Court did not run foul of the principles that the burden of proof in a claim for constructive dismissal lies on the aggrieved workman that is the first respondent in the instant case. However, there are two burdens of proof involved in this case. The first burden of proof is the onus of proving that the first respondent was constructively dismissed by the applicant. The second burden of proof is the burden of proving that the first respondent was bound by a compulsory retirement age of 55 years under the terms of her contract of employment.

[17] The first burden of proof is the onus of proving that the first respondent was constructively dismissed by the applicant. The onus of proof rests on the first respondent who has to prove the following elements:

(i) that the applicant's conduct as such is guilty of a breach which goes to the root of the contract or evinced an intention no longer to be bound by it;

(ii) that the first respondent had made up his mind and had acted at the appropriate time soon after the conduct of which the complaint had taken place;

(see *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92).

[18] In this regard, the Industrial Court was satisfied that the first respondent had succeeded in proving the above two elements. The Industrial Court was satisfied that the applicant's conduct was a serious breach of her contract of employment when the applicant had purported to retire the first respondent on reaching 55 years of age, in the absence of any retirement age of 55 years in her contract of employment. The Industrial Court said at para 21 of the award as follows:

> 21 In regard to paragraph 20(a) and (b) above, this Court finds that the Company, in purporting to unilaterally retire the claimant at 55 years in the absence of an express term allowing the Company to do so, did commit a breach of the claimant's contract of employment. The court finds this breach to be a fundamental breach going to the root of the contract. To retire an employee in breach of contract is to deprive that employee of his right to continue to earn a living. As enunciated by the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 at p 510 per Dato Gopal Sri Ram:
>
> > 'Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood'.

[19] The Industrial Court was also satisfied that the first respondent had left the applicant's services in response to the aforesaid breach by the applicant and had acted at the appropriate time. The Industrial Court stated as follows:

> 22 In short, by issuing CLE 8; CLE 10 and CLE 13; the Company evinced an intention not to be bound by CLE 1. This Court finds that the claimant did leave the Company which leaving was in response to the Company's breach thereby fulfilling paragraph 20 (c) above.
>
> 23 In regard to 20 (d) above, this Court also finds that the claimant did not delay in treating herself as having been constructively dismissed. The claimant has given a cogent explanation in her evidence as regards the Company's letter CLE 8 dated 7 October 1998. Upon receiving CLE 8 she went to see Dr Wong Wai Peng. He was equally shocked and he told her not to sign anything, to ignore CLE 8 that he would bring it up to the Board that everything was OK. At the Management Meeting on 16 October 1996 COW 1 said 'everything is back to normal no one needs to cry.' Which the claimant took to mean that she could carry on working. Her letter claiming constructive dismissal CLE 14 is dated 8November 1996, and it came a day after the Company's second letter offering reemployment CLE 13. In the circumstances this Court find no delay, on the part of the claimant in claiming constructive dismissal.

[20] To me, the Industrial Court had not committed any error to justify intervention of this court.

[21] The second burden of prove is the burden of proving that the first respondent was bound by a compulsory retirement age of 55 years under the terms of her contract of employment. I am of the view that burden or onus of proof on this issue rests on the applicant because it is the applicant who sought to rely on the existence of such contractual terms in its case before the Industrial Court. The authority for this proposition is found in s 101 of the Evidence Act 1950 which provides:

> Section 101: Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.

[22] To me, since the applicant's case is the first respondent's had purportedly reached the 'statutory age of 55 years' and was contractually obliged to retire at 55 years of age, the burden of proof rests on the applicant to prove the existence of such contractual clause or statue binding on the first respondent. I find that the applicant had failed to do so. In this respect, the Industrial Court had applied the law correctly and had correctly followed the case of *HSS Integrated Sdn Bhd v Lew Yew Onn* [2000] 3 ILR 31 where the following was stated:

> … It is not disputed that the terms of compulsory retirement at the age of 55 does not exist in the claimant's contract of employment. It is therefore, incumbent upon the company to prove that the claimant had agreed to the imposition of his new term since it is settled law that one party to the contract cannot vary or modify the term of the contract without the agreement consent of the other party.

[23] The next issue is did the Industrial Court act on hearsay evidence? I am of the view that the Industrial Court did not act on hearsay evidence. The evidence of the first respondent that she was assured by Dr Wong that she did not have a retirement age is not hearsay evidence. The following passage from *Cross on Evidence* (7th Ed, Butterworths) explain the legal position:

> … Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact it was made.

[24] In our present case the first respondent had testified that Dr Wong told her during the interview before she joined the services of the applicant that there was no retirement age for her. In its award, the Industrial Court made the following findings:

> … The claimant asserts that Dr Wong Wai Peng told her during her interview that there was no retirement age. The claimant did attempt to call Dr Wong to give evidence. But Dr Wong tore the subpoena CLE12 into two, when service was attempted on him by the claimant's son COW2. This court is satisfied from the

evidence that the general age of retirement in the Company is 55 years but that Dr Wong did in fact give the claimant such an assurance and that he was acting for and on behalf of the Company and that he had authority to do so. This Court finds that the assurance given by the Wong was instructed in the claimant accepting the offer of employment CLE1. It was a clarification given by Dr Wong since CLE1 did not contain any provision pertaining to retirement. This reinforces the contention that the claimant was not to retire at the age of 55 years …. .

[25] To me, the Industrial Court, has made a finding of fact. This court has no reason to disturb such finding bearing in mind this is a judicial review. No doubt, the first respondent attempted to subpoena Dr Wong to support her testimony, but this does not in any way, absolve the applicant of discharging its burden of proof on the retirement age as a term of contract, which it had evidently failed to do so.

[26] I am also unable to hold that the first respondent had failed to plead the facts regarding her retirement age. In connection with this issue, the Industrial Court had found as follows:

This Court is further satisfied that the issue of retirement was pleaded by the claimant in paragraph 3.2 of her statement of case and accepts that evidence in regard to therefore, be tendered in Court … .

[27] I have no reason to disagree. The object of pleadings is to prevent one's opponent from being taken by surprise. The applicant in the instant case cannot possibly claim that it had no idea or was taken by surprise by the first respondent contention that there was no retirement age of 55 years in her contract.

[28] Thus, to me the first ground of challenge by the applicant is clearly without merit.

SECOND GROUND OF CHALLENGE

[29] The applicant second ground of challenge is in respect of the retirement age clause contained in the 'Employee's Hand Book'. The Industrial Court in coming to its decision had referred to two exhibits that is CLE 7, (the Employees Hand Book) and COE 17 ('Confirmed Employees Service Regulation Handbook'). In regards with the two exhibits the Industrial Court made the following findings:

That it stood to reason that an important document like CLE 7 which laid down the 'Employment Policies', 'Compensation and Benefit' and other important Conditions of Employment needed more than just the approval of the General Manager, it was logical that the approval of the Board of Directors was needed before it could be issued;

That CLE 7 had been issued at the time of the claimant's leaving the Company; and

Thus, in accordance to Para 12(b) above, the claimant therefore, cannot be deemed to be bound by those specific provisions and express conditions found in CLE 7 and COE 17 which state that all employees shall retire on attaining the age of 55years, nor does this Court find it equitable or in good conscience to hold that there exists an implied terms that the claimant must retire at the age of 55 years.

[30] The applicant contends that in reaching such findings, the Industrial Court had failed to have regard to the evidence before it in particular the testimony of Dr Ismail Abdul Rashid (COW1) who confirmed that there was no need for the Board's approval before CLE 7 could be issued. Further exh CLE 7 was expressly approved by the first respondent on 1 September 1996 and the document is silent on a further approval by the Board before it could be issued and this material fact of the purported need for the Board's approval was also not pleaded by the first respondent in her statement of case. In the circumstance, the applicant contends that the Industrial Court had acted on an incorrect basis of fact and had erred in law and misconstrued the content and effect of exhibits CLE 7 and COE 17.

[31] In support of the above, the applicant relies on the Court of Appeal in *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372 where at p 378 the Court of Appeal held inter alia as follows:

Counsel for the applicant submitted that the notes of evidence in enclosure 6 does not record any evidence of the applicant having admitted that he had signed the resignation letter and agreement on his own accord. There was however, no submission in reply on this point by learned counsel for the respondent. After perusing the applicant's testimony, I with respect, agree with the applicant's counsel's submission. There is nothing in the evidence to show that the applicant ever said that he did sign the documents on his own accord. Neither is there evidence to support the finding that; 'His evidence on a balance of probability that he did not know what he signed'. On the contrary, there is evidence to say that the applicant had read the document before he signed when he said at page 16 para C in enclosure (6); 'I had read it carefully before I signed'. But under cross-examination by counsel for the respondent at page 15 Para C in enclosure (6), he replied: 'I did not sign voluntarily'. *This piece of evidence cannot be ignored. With such evidence before the Court, the findings of the learned Chairman cannot be said to be reasonable and justified. It is duty of the Industrial Court to scrutinize the evidence before it with utmost care and to do that, it must at all times keep itself alert to the issues and attend to matters it is bound to consider (R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145). It is obvious in this case that the Industrial Court had failed to investigate and analyse the facts properly before him. Had he done so, his conclusion would have been different. To find that the applicant had signed the documents on his own accord without supporting evidence is indeed perverse. By such finding, the Industrial Court had acted on an incorrect basis of fact on an issue which goes to the very crux of the applicant's case,* that is whether the applicant had voluntarily resigned or was dismissed, therefore, there is a clear error of jurisdiction committed by the Industrial Court when it made the findings which are contrary to the recorded evidence. Accordingly, the findings are perverse. (Emphasis added.)

[32] I am unable to agree with the applicant's submission that the Industrial Court had erred in law and misconstrued the content and effect of exhibits CLE 7 and COE 7. It must be firstly be noted the Industrial Court had made a finding of fact that the first respondent had a hand in the collective effort to prepare the contents of CLE 7. The Industrial Court also made a finding of fact that at the time the first respondent left the applicant on 8March 1996, COE 17 as a document was not in existence and exhibit CLE 7 had not been issued. The Industrial Court also found that the first respondent cannot be deemed to be bound by those provisions in CLE 7 and COE 17, nor is it equitable or in good conscience to hold that there exist an implied term that the first respondent must retire at 55 years of age.

[33] I have no reason to disagree with the above findings. The Industrial Court in fact, did consider the evidence of COW 1 but rejected it after weighing the other surrounding evidence.

[34] I am also of the view that since it was the applicant who was seeking to establish as part of its case that CLE 7 was a 'final version' and did not need the Board's approval, it is for the applicant to plead as such in its pleading and not the first respondent to do so, as suggested by the applicant. Therefore, the applicant's second ground of challenge is also without merit. The case of *Swedish Motor Assemblies* cited by the applicant is irrelevant to the issue raised.

THIRD GROUND OF CHALLENGE

[35] The applicant third ground of challenge is in respect of the Industrial Court's interpretation of the applicant's letter dated 13 July 1995 in relation to the first respondent sponsorship for post-graduate studies. The Industrial Court in the course of its award made the following findings:

> The claimant was born on 31 October 1941. Thus, when she started the course on 28 April 1991, she was about 53 years 6 months. This meant that when she completed the course she would be 55 years 6 months (not 56 years as stated by the claimant in evidence, nor 56 + as submitted by her counsel), and 58 years 6 months after she completed her bond. This clearly indicates that on the date of CLE 3, that is 13 July 1995 (which is roughly 5 months after she joined) it was understood by the parties that she would work for the company at least up to the age of 58 years 6 months. This in relation to paragraphs 12(d) above clearly demolished any argument that she had to retire at 55 years. The company cannot unilaterally blow hot by binding her to work till she is 58 years 6 months and then blow cold by forcing her to retire at the age of 56 years.

[36] It is the applicant's submission that the letter dated 13 July 1995 had bonded the first respondent to work for it in 'an appointment to be determined by the Medical Centre' and that it was merely 'giving effect to the terms and conditions' by retiring her and thereafter, offered her continued employment on a contractual basis.

[37] As argued by the respondent, the submission is without basis. The clause of the sponsorship agreement clearly states, '… on completion of the course, you will be obliged to serve the Company for a period of three years (bonded period) in an appointment to be determined by the Medical Centre which will not be lower in the rank than your present appointment'. It is undisputed facts that at the date the applicant attempted to forcibly 'retire' her thus leading to her claim to constructive dismissal with effect as on 9November 1996, the first respondent had still not completed her Masters of Science in Healthcare Management Course. Furthermore, evidence was led by the first respondent to show that the two subsequent letters of re-employment offered to the first respondent by the applicant contained less favourable terms and conditions of employment and therefore, rejected by the first respondent. The Industrial Court consequently made a finding of fact that the two letters of 're-employment' offered were in fact on less favourable term.

[38] Thus, I am also of the view that this ground does not disclose any error of law justifying intervention by way of judicial review.

FINAL GROUND OF CHALLENGE

[39] The applicant final ground is the manifest unreasonableness in the Award of back wages awarded in favour of the first respondent. This relates to the Industrial Court's award of back wages for the total duration of 44 months, totaling to RM273,000. Although an adjustment was made by reducing the quantum by 30% and making the sum awarded to RM191,730, the applicant submit that the sum awarded was erroneous as it goes against the very policy, objective and general scheme of the Act.

[40] The complaint by the applicant is that, the Industrial Court in awarding the maximum quantum of back wages, had failed to appreciate that the delays in this matter had nothing to do with the applicant. The applicant list down the sequence of events that contributed to the delays as follows:

(a) The matter was referred to the Industrial Court vide a reference from the Honorable Minister of Human Resources dated 13 August 1997.

(b) The case came up for hearing almost two years later on 5 May 1999.

(c) On 7 May 1999, after hearing the evidence of the first respondent and the applicant's first witness, the learned Chairman of the Industrial Court decided to transfer the case to another division of the court.

(d) The matter was mentioned before a new Chairman on 26 May 1999 who decided to hear the case de novo and hearing dates were fixed consecutively on 1 and 2 November 1999. However, the learned Chairman, after having reviewed the file, found the matter to be highly contentious.

As he was due to retire very soon, this Chairman too declined to hear the matter as he had to clear all his part-heard cases.

(e) The matter was finally heard de novo before yet another Chairman over a period beginning on 21 July 2000 and ending on 2 July 2002.

[41] According to the applicant, all the events that occasioned the delay were absolutely beyond the control of the applicant. Thus, it is submitted that the Industrial Court Award of 44 months of back wages from the date of dismissal on 9 Novermber 1996 till the last day of hearing on 2 July 2000 is patently excessive and unreasonable.

[42] Without doubt, there is a considerable delay in concluding this case before the Industrial Court. But it cannot be a reason to reduce further an award of the Industrial Court. This is because as submitted by the first respondent that none of the causes of the delays as raised by the applicants were caused by the first respondent. Like the applicant, the first respondent must be equally frustrated with the delays. She also has had to patiently wait for the case to be disposed of. In any event, the Industrial Court has already reduced the back wages due to first respondent by 30% on account of her post-dismissal employment. Therefore, I am of the view, there is no valid reasons in law for the applicant to seek this court to further reduce the amount of back wages payable to the first respondent on the grounds raised by the applicant.

CONCLUSION

[43] The learned Chairman's finding that the second respondent had been constructively dismissed in this case is a finding of fact. The finding is based on the totality of evidence adduced before him. To me, the learned Chairman had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the Industrial Court and to make another finding of fact. As stated by the Supreme Court in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 that the tasks of facts finding fall within the jurisdiction of the Industrial Court. What is important for me to consider is whether the findings of the Industrial Court is well supported by evidence adduced in the course of trial and it has not taken irrelevant matters into consideration in making the Award. I find that the Industrial Court findings is well supported by evidence and it has not taken irrelevant matters into consideration.

[44] In conclusion, I am of the view that the Industrial Court Award does not suffer any of the infirmities of 'illegality', 'irrationality' or 'procedural impropriety'. The award was neither perverse nor unreasonable. The grounds of challenge raised by the applicant do not disclose any error of law warranting intervention by this court by way of judicial review.

[45] Accordingly, I have no alternative but to dismiss the applicant's application with costs.

Application dismissed.

Reported by Lim Lee Na